interest of the heirs, the receiver could be required to turn over to them the profits from the publication.[69]

## TEMPORARY UTILITY RATES

THE LOGIC of the fair-return-on-a-fair-value concept requires that the rates for public utility services be reduced during depressions.[1] When the earnings of all industry fall, the fair return to which utilities are constitutionally entitled should be deflated; and when the general price level declines and all economic values collapse, utility properties should be assessed at lower figures. The failure of utility rates to move downward during a period of depression contributes an element of rigidity to the price structure which impairs its capacity to meet the strains of a depression. Domestic consumers must either curtail their use of gas, electric, and telephone services or pay a disproportionately large share of their reduced incomes for them;[2] and industrial consumers who must pay for utility services at a high rate have

69. If the receiver is allowed to publish, yet is required to turn over the profits from the publication to the writer's heirs, probably less profit will be realized from publication than if the power to sell and the profits arising from the sale remained in the same hands. For the receiver, having no interest in the profits, might publish immediately upon the writer's death, despite the fact that the letters might bring more if publication were deferred for a period of years. Yet if all the profits are given to the representatives of the writer, surely they are amply protected financially.

1. See Prendergast, *The Economic Emergency as a Factor in Rate Making* (1932) 10 P. U. FORT. 243, 247; Lilienthal, *Regulation of Public Utilities During the Depression* (1933) 46 HARV. L. REV. 745, 751; Rooks and Booth, *Current Problems of Public Utility Rate Regulation* (1934) 13 ORE. L. REV. 122; JONES AND BIGHAM, PRINCIPLES OF PUBLIC UTILITIES (1931) 94.

2. That the necessity of utility services forces this latter course seems evident from the inflexible demand for them despite the depression.

| *Totals for all Utilities* | 1934 | 1933 | 1932 | 1931 | 1930 | 1929 | 1928 |
|---|---|---|---|---|---|---|---|
| *Electricity* | | | | | | | |
| Millions of customers | 24.8 | 24.3 | 24.5 | 24.5 | 24.6 | 24.1 | 23.2 |
| Billions of k.w.h. sold | 70.8 | 65.8 | 63.8 | 71.9 | 74.9 | 75.2 | 67. |
| Average domestic consumption in k.w.h. | 631 | 604 | 601 | 584 | 548 | 500 | 463 |
| *Manufactured Gas* | | | | | | | |
| Millions of customers | 9.9 | 9.76 | 10. | 10.4 | 10.4 | 10.2 | |
| Millions of m.cu.ft. | 359 | 340 | 356 | 389 | 401 | 399 | |
| *Natural Gas* | | | | | | | |
| Millions of customers | | 7.2 | 7.0 | 7.0 | 5.4 | 5.0 | 4.3 |
| *Telephones* | | | | | | | |
| Millions of stations | | 15.4 | 16.1 | 18.1 | 18.4 | 18.2 | 16.8 |
| Average monthly messages in billions | | 2.23 | 2.39 | 2.59 | 2.63 | 2.63 | 2.44 |

Source: MOODY'S PUBLIC UTILITIES (1935) pp. a18, a21, a41, a47, a52.

difficulty in adjusting their costs of production to lower levels.[3] Furthermore, the rigidity of utility rates results in an uneven incidence of the depression and in more severe deflation of other prices as incomes continue to fall.[4]

Nothwithstanding the implications of the fair-return-on-a-fair-value concept, the equities in favor of consumers, and the economic arguments for flexibility in prices, utility rates have resisted the downward trend of prices during the current depression with remarkable success.[5] Speedy adjustment of rates has been rendered impossible by the traditional technique of rate-making judicially imposed upon utility commissions. The valuation upon which rates may constitutionally be based relies heavily upon reproduction cost less depreciation;[6] and investigation and analysis of the composite elements of reproduction cost is a cumbersome process requiring far too much time to be effective during depression.[7] Against any attempt to reduce utility

3. Contrast the sharp decrease of the total of national income with the level of utility charges shown in note 5, *infra*.

| *National Income* | 1934 | 1933 | 1932 | 1931 | 1930 | 1929 | 1928 | 1927 |
|---|---|---|---|---|---|---|---|---|
| Billions of dollars | 47.6 | 41.8 | 39.365 | 54.643 | 70.345 | 80.031 | 80.3 | 77.2 |

Figures from National Bureau of Economic Research and National Industrial Conference Board, MOODY'S PUBLIC UTILITIES (1935) p. a5. See Phleger, *Quo Vadis?* (1933) 58 A. B. A. REP. 660.

4. Lilienthal, *supra* note 1, at 749 and authorities there cited; *In re* Wisconsin Telephone Co., P. U. R. 1932D, 173; Newton D. Baker, counsel in Matter of East Ohio Gas Co., No. 7130, filed Aug. 18, 1932, before the Public Utility Commission of Ohio.

5.

| | 1934 | 1933 | 1932 | 1931 | 1930 | 1929 | 1928 | 1927 |
|---|---|---|---|---|---|---|---|---|
| *Electricity* cents/k.w.h. | | | | | | | | |
| Domestic | 5.30 | 5.49 | 5.58 | 5.78 | 6.03 | 6.34 | 6.63 | 6.82 |
| Retail | 3.89 | 4.01 | 4.09 | 4.17 | 4.13 | 4.24 | 4.44 | 4.48 |
| Wholesale | 1.34 | 1.38 | 1.53 | 1.48 | 1.42 | 1.38 | 1.41 | 1.47 |
| Total (weighted) | 2.60 | 2.70 | 2.88 | 2.75 | 2.66 | 2.57 | 2.66 | 2.71 |
| *Manufactured Gas* dollars/m.cu.ft. | | | | | | | | |
| Domestic | 1.06 | 1.11 | 1.15 | 1.11 | 1.11 | 1.11 | | |
| *Natural Gas* cents/m.cu.ft. | | | | | | | | |
| Total | | 23.7 | 24.7 | 23.3 | 21.4 | 21.5 | 23.2 | 22.0 |
| *Index of Street Railway Fares* (1913 = 100) | 161.5 | 162.5 | 162. | 161. | 160. | 157. | 155.5 | 153.5 |

The figures are national averages for all companies. Source of statistics: MOODY'S PUBLIC UTILITIES (1935) pp. a17, a43, a48, a39, tables taken from U. S. Bureau of Labor Statistics, Interstate Commerce Commission, U. S. Dept. Labor. See Lilienthal, *supra* note 1, at 748, 749, 751.

6. See Goddard, *The Evolution of Cost of Reproduction as the Rate Base* (1927) 41 HARV. L. REV. 564; West v. Chesapeake and Potomac Tel. Co. of Baltimore, 295 U. S. 662 (1935), *rehearing denied*, 296 U. S. 661 (1935).

7. See Comment (1930) 40 YALE L. J. 81.

rates drastically during a depression, however, the argument is made that public service companies, subject to constant governmental supervision, are permitted during booms to earn an income but little above the level of confiscation and therefore should not be compelled to reduce their rates in a depression. The premise of the argument, however, that during the expanding phases of a business cycle the earnings of industry in general are far above those of utilities cannot be taken at its face value; on the contrary, convincing evidence indicates that the incomes of utilities in periods of expansion actually compares favorably with the earnings of all industry.[8] Moreover, the development of numerous utility holding company systems is indirect evidence that the utilities have not been without substantial revenues.

Although many public utility statutes have long contained vague "emergency" provisions for the fixing of "temporary" rates,[9] those provisions have been little used except when they were invoked to sanction rate increases to meet the extraordinary war conditions. In the few cases in which these statutes were applied by commissions to order reductions in rates, the courts have found them constitutionally defective. Three states, however, have recently adopted more comprehensive temporary provisions especially

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8. NERLOVE, A DECADE OF CORPORATE INCOMES (1932) chs. III, VI, VII. Return on Invested Capital, by Major Groups. (percentage).

| | 1920 | 1921 | 1922 | 1923 | 1924 | 1925 | 1926 | 1927 | 1928 | 1929 |
|---|---|---|---|---|---|---|---|---|---|---|
| Mining and Quarrying | 8.1 | -4.4 | 0.3 | -0.6 | -0.9 | 4.1 | 4.6 | 0.7 | 2.3 | 4.1 |
| Manufacturing | 9.5 | -0.2 | 7.5 | 9.9 | 7.5 | 9.6 | 9.2 | 7.6 | 9.2 | 9.7 |
| Construction | 10.5 | 2.3 | 5.9 | 11.7 | 11.3 | 13.2 | 12.8 | 12.4 | 11.2 | 10.9 |
| Trade | 7.3 | -0.6 | 8.6 | 11.0 | 9.1 | 10.3 | 8.7 | 8.0 | 9.1 | 6.7 |
| Total—All Corporations | 7. | 1.1 | 6. | 7.5 | 6.4 | 8.3 | 7.9 | 6.8 | 7.9 | 7.7 |

These figures from NERLOVE, Ch. VII, should be contrasted with the average of approximately 7½% allowed utilities under ordinary circumstances. An interesting light is cast by the figures of net earnings of 1018 Corporations by groups. Source: MOODY'S PUBLIC UTILITIES (1935) p. a5:

| | 1934 | 1933 | 1932 | 1931 | 1930 | 1929 | 1928 | 1927 | 1926 |
|---|---|---|---|---|---|---|---|---|---|
| 923 Industrials | | | | | | | | | |
| Millions of dollars | 1198.8 | 778.2 | D44. | 766.8 | 766.8 | 3672.1 | 3124. | 2546.6 | 2732.1 |
| Index | 44 | 28 | -6.2 | 28 | 28 | 134 | 114 | 93 | 100 |
| 70 Electric Utilities | | | | | | | | | |
| Millions of dollars | 274.6 | 294.5 | 343.5 | 413.6 | 413.6 | 414.4 | 365.7 | 314.5 | 274.6 |
| Index | 100 | 107 | 125 | 150 | 150 | 151 | 133 | 115 | 100 |
| 25 Gas Utilities | | | | | | | | | |
| Millions of dollars | 133.3 | 128.6 | 139.3 | 193.4 | 193.4 | 217.1 | 191.1 | 166.1 | 155.1 |
| Index | 86 | 83 | 90 | 125 | 125 | 140 | 123 | 107 | 100 |

See Lilienthal, *supra* note 1, at 767.

9. Swidler, *The Uncertainties in the Legal Status of Temporary Rates* (1933) 12 P. U. FORT. 136 and 202. Detroit v. Detroit Edison Co., (Mich. P. U. Comm.) P. U. R. 1933E, 193, 198.

designed to meet depression conditions and to remedy deficiencies hitherto pointed out by the courts.[10] In those states the commissions are authorized to establish temporary rate schedules based on limited criteria of value and to be effective only pending a complete evaluation of all the factors necessary for the determination of the final rate in the traditional manner. If the temporary rates are eventually found confiscatory, provision is made in the final rates for recoupment to the utility of the loss suffered during the temporary period.

The temporary rate schedule appears to be a sensible method of adjusting utility rates to a price level which has moved sharply either upward or downward. The establishment of temporary rates either under the older general temporary statutes or under the more recently enacted and more comprehensive provisions raises issues of statutory and constitutional significance. (1) What are the conditions which justify the fixing of a temporary rate schedule? (2) To what sort of hearing is the utility entitled? (3) Upon what criteria of value may the temporary return be based? (4) What is the content of the concept of "fair return" during a depression? (5) And finally, what adjustments between the temporary and final rates will the courts require to prevent them from classifying temporary rates as deprivations of property without due process of law?

Before a radical departure from the traditional technique of rate-making may be justified, most statutes require a finding of facts appropriate to the theory of the temporary rate statute—a condition generally characterized as an "emergency". The legislatures usually delegate this determination to the public utility commissions, giving them vague and varied standards to apply. Some statutes simply rely upon the term "emergency" without further definition,[11] the New Jersey statute, for example, giving the commission complete discretion on this issue;[12] in New York the "public interest" must demand the summary rates,[13] and in Illinois and Virginia it is necessary to find that a utility has earned an income during the depression greatly exceeding one ordinarily considered reasonable.[14] Findings of the prerequisite "emergency" by commissions is similarly varied, ranging from

10. ILL. ANN. STAT. (Smith-Hurd, 1934) c. 111 2/3, § 36; NEW YORK PUBLIC SERVICE LAW § 114; VA. CODE (Michie, Supp. 1934) § 4071a. See Palmer, *New York Utility Legislation in 1934* (1934) 23 NAT. MUNIC. REV. 594, 595.

11. IND. STAT. ANN. (Burns, 1926) § 12795; OHIO ANN. CODE (Page, 1926) § 614-32; WIS. STAT. (1935) § 196.70.

12. N. J. Laws 1935 c. 49. The New Jersey Board may "negotiate and agree" with the utility for a temporary rate. Its inability to set a rate without the utility's agreement renders the act useless. Irvington v. Commonwealth Water Co., (N. J. Bd. P. U. Comm'rs, 1935) 10 P. U. R. (N. S.) 329.

13. N. Y. PUBLIC SERVICE LAW § 114.

14. See note 10, *supra*.

"common knowledge"[15] to thorough economic investigation.[16] Whether the emergency which purports to justify temporary rates falls within the statutory definition, whether there has been undue delegation of power to the commissions on that issue, and, even assuming a proper statutory finding of emergency arrived at in a procedurely correct manner, whether that emergency constitutionally justifies the fixing of temporary rates without a thorough investigation of valuation are questions which present issues upon which temporary rates may be judicially attacked. But the issue of emergency, no matter how raised, should cause little difficulty to courts sympathetic to the attempt to adjust rates when all other prices and values have collapsed; for such a court would require no elaborate tables of index figures or findings of fact to convince it that an emergency exists and that the traditional extended valuation proceedings would be woefully inadequate to achieve the purposes of temporary rate legislation. On the other hand, if a court is unsympathetic to temporary rate schedules, it will be able to find constitutional objections to the experiment more persuasive than the propriety of the finding that an emergency exists.

Due process of law, in the procedural sense, would appear to require that a utility be granted a hearing prior to any rate revision, even if the new rates are provisional and temporary and if a final rate, in the determination of which the utility will be heard, is to correct whatever deficiencies are discovered in the temporary schedule. In view of decisions enjoining rate orders entered without a hearing, most recent temporary rate statutes provide for a hearing,[17] and commissions have uniformly construed incomplete statutes as so providing.[18] An extended hearing upon all the elements of a complete valuation, however, would frustrate the primary purpose of the temporary orders to adjust utility rate schedules speedily. The requirements of due process should be held satisfied if the utility is given an opportunity to present evidence on the limited issues set forth in the temporary rate

15. LaCrosse v. R. R. Comm., 172 Wis. 233, 178 N. W. 867, P. U. R. 1921A, 22 (1920); *In re* Southern California Gas Co., (Calif. R. R. Comm.) P. U. R. 1933E, 61. Some commissions have compared existing conditions with a definition of "emergency" in terms of utilities. *In re* Lincoln Traction Co., (Neb. St. Ry. Comm.) P.U.R. 1918D, 168; *In re* Nashville Ry. and Light Co., (Tenn R. R. and P. U. Comm.) P.U.R. 1920C, 3; *In re* Okla. Nat. Gas Corp., (Okla. P.U.C.) P.U.R. 1931B, 470, 476.

16. *In re* Wisconsin Telephone Co., P.U.R. 1932D, 173, 244 *et seq.;* See Lilienthal, *supra* note 1, at 746.

17. See Smith, *Emergency Rates and Due Process* (1934) 14 P. U. Fort. 624. Indiana General Service Co. v. McCardle, 1 F. Supp. 113, P.U.R. 1932D, 378 (S.D. Ind. 1932); Tri-State Tel. and Tel. Co. v. Benson, P. U. R. 1933A, 38 (D. Minn. 1932).

18. Smith, *supra* note 17, at 625 and cases there cited; Ill. Commerce Comm. v. Public Service Comm. of Ill., 4 P.U.R. (N.S.) 1, 76; *In re* Wisconsin Telephone Co. P.U.R. 1932D, 173.

statutes,[19] particularly since there will be an extended hearing before the utility's rights are definitely settled in the final rates.

The fact that reproduction cost new is an important element of fair value renders the traditional valuation procedure far too cumbersome when rapid adjustment of rates is sought. One of the remedies for this situation is a restriction in the criteria of value which must be investigated by commissions before temporary rates may be fixed. Although some general temporary statutes simply authorize commissions to fix temporary rates in emergencies without elaboration of procedures or conditions precedent,[20] recent statutes fill in the details more completely. The Virginia and Illinois statutes provide for an investigation similar to that traditionally employed for rate-making, but in abbreviated form.[21] The commissions in those two states are directed to examine the reports, books, and property of utilities to determine the extent to which rates must be reduced to bring them down to levels considered reasonable.[22] The New York statute is unique and quite definitely more effective.[23] The criterion of value there prescribed is original cost less accrued depreciation, and the utilities are required to keep their records and accounts in such manner that those figures are readily available at all times. This treatment of value for temporary rate-making purposes in New York can be simply administered and permits more speedy and efficient adjustment of rates during a depression than any of the procedures outlined in other temporary rate statutes.

Fair return, the first half of the traditional formula by which courts assess the constitutional reasonableness of rates, theoretically offers a measure of flexibility which may be profitably exploited during a depression. Mr. Justice Butler has defined a fair return as "that [return] generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties."[24] The sharp reduction in the earnings of all business enterprises during the depression suggests that a reconsideration of the

19. Such evidence should satisfy the requirement of a reviewing court for a record showing the basis of the commission action. Smith, *supra* note 17, at 626.

20. See note 11, *supra*.

21. See note 10, *supra*.

22. The temporary rate is to absorb only the amount by which the existing net income exceeds a reasonable return. Statutes cited note 10, *supra*. Only one order has been made under these closely similar statutes, Illinois Commerce Comm. v. Public Service Co. of Northern Ill., (1934) 4 P. U. R. (N. S.) 1, but the Virginia Commission has with the aid of the statute negotiated for revisions in gas, water, and electric rates saving $3,000,000 annually. Communication to the Yale Law Journal, Oct. 5, 1936, from H. E. Ketner, Commerce Counsel, State Corporation Commission.

23. See note 10, *supra*.

24. Bluefield Waterworks Co. v. Public Service Commission of West Virginia, 262 U. S. 679, 692-3 (1923).

fair return concept might go a long way toward permitting utility rates to be reduced in depressions. The temporary rate statutes, however, make no attempt to manipulate "fair return" to achieve this end. Even the New York statute provides that temporary rates shall return at least 5% to the utility on the value of its property as determined by the book value criteria of the statute.[25] Moreover, in spite of the flexibility theoretically inherent in the judicial definition of fair return, when the courts consider the issue, they appear to hit upon an arbitrary percentage without reference to the comparative level of earnings in business undertakings attended by the same risks. In view of this experience it is unlikely that the Supreme Court will permit utility earnings to fall during a depression as far as the implications of its definition of fair return would suggest.[26]

An alternative criterion—stressing "value of the service" rather than its cost as the decisive factor in fixing emergency rates—is beginning to emerge. While it might be urged that "value of the service" and "fair return upon fair value" are competing ambiguities expressing the same thought, the former manner of statement definitely looks to the interests of consumers, and seems to permit rate reductions during depressions more easily than fair-return-on-a-fair-value techniques. This standard in rate-making is necessarily approximate, and perhaps meaningless in a field, like utility rates, where prices are only remotely influenced by factors of competition; the problem is analogous to the rate-making issue in connection with railroad rates, and the regulation of carriers in general, where "what the traffic will bear" is said to be still the basic standard used by the carrier in formulating its rates and a standard of considerably more practical importance even for the courts than the rule that rates must be "reasonably compensatory."[27] Although "value of the service" can hardly be considered an objective criterion upon which utility rates may be based with any degree of definiteness, findings based on such a standard are not more completely judgments of opinion than conclusions required by an application of "fair return upon a fair value" concepts. And the Supreme Court has expressed verbal approval of the formula; for in *Smyth v. Ames*[28] the statement was made that "the public is entitled to demand . . . that no more be exacted from it than

25. See note 10, *supra*.

26. During ordinary times a return of 6% has been found non-confiscatory. Dayton Goose Creek Ry. v. United States, 263 U.S. 456 (1924); Cedar Rapids Gas Co. v. Cedar Rapids, 223 U.S. 655 (1912). An equal or but slightly lower return has been found lawful during the depression. *In re* Customers of New Bedford Gas and Edison Light Co., (Conn. Public Service Comm. 1933) P.U.R. 1933D, 256 (6%); Illinois Bell Tel. Co. v. Gilbert, 3 F. Supp. 595, P.U.R. 1933E, 301 (N. D. Ill. 1933) (5½%); Kankakee Water Co. v. Gilbert, P.U.R. 1933B, 145 (E. D. Ill. 1933) (5.17%).

27. See DANIELS, THE PRICE OF TRANSPORTATION SERVICE (1932) 85.

28. 169 U. S. 466, 547 (1897).

the services rendered are reasonably worth", and this view has been repeated upon several occasions.[29]

Believing that those words mean something, some commissions have established and some courts have approved emergency rate schedules scaling down utility charges on the theory that the value of utility services declined during a depression. The Wisconsin Commission in the notable *Wisconsin Telephone Company* case took this position when it reduced rates for local exchange service by 12½%.[30] The Commission found that the existing rates were unreasonably high and ordered reduced rates to be applied for a temporary period. The method used to arrive at the figure of 12½%, however, indicates the difficulty of breaking entirely away from the concept of a "fair return upon a fair value" in the utility field; for the Commission found that the reduced rates would yield a sum sufficient to pay all operating expenses and provide for depreciation, taxes and interest, and dividends on preferred stock with 6% on the common stock attributable to the local exchange property, leaving in addition a "cushion" of $288,000.[31] The Commission further considered the earnings at that period of other business enterprises with comparable risks in the same area and the need of the utility for new capital and a sound credit position in light of then existing conditions.[32] Although upon the appeal of the case the Supreme Court has refused to commit itself on the validity of this procedure,[33] the Wisconsin Commission has continued its policy of giving "value of service" the paramount place in emergency rate determination.[34] The Alabama Commission

29. San Diego L. & T. Co. v. National City, 174 U. S. 739, 757 (1899); Illinois Cent. R. R. v. I. C. C., 206 U. S. 441, 463 (1907); Minnesota Rate Cases, 230 U. S. 352, 454 (1913); Darnell v. Edwards, 244 U. S. 564, 570 (1917).

30. *In re* Wisconsin Telephone Co., P.U.R. 1932D, 173.

31. *Id.* at 240–1; *Cf.* Prendergast, *supra*, note 1, at 243, objecting on the ground that no allowance is made for expansion or contingency reserve.

32. *Id.* at 272–3.

33. Hearings on the Wisconsin Telephone case began July 29, 1931. A temporary order was issued June 30, 1932. A temporary restraining order was obtained from a single Federal judge and application made to a statutory three judge court for an interlocutory injunction which was granted with a finding that the temporary rate was confiscatory, but with no findings of fact. The injunction was vacated by the Supreme Court, the restraining order being kept, and the case remanded to the statutory court for findings of fact and conclusions of law. P. S. Comm. of Wisconsin v. Wisconsin Tel. Co., 289 U. S. 67 (1933), P. U. R. 1933C, 264. That procedure has not been carried out. A second temporary order was issued and restrained with application for an interlocutory injunction. And a third order was issued, July 5, 1934. *In re* Wisconsin Telephone Co., 6 P.U.R. (N.S.) 389.

34. Gehrke v. Interstate Light and Power Co., (Wis. P. S. Comm.) P.U.R. 1933C, 154; *In re* Wisconsin Power and Light Co., P.U.R. 1933D, 156 ("interim rates" not termed "reasonable" but merely tentative or interlocutory); Penterman v. Kaukauna, (Wis. P. S. Comm.) P.U.R. 1933B, 397; Russell v. Commonwealth Co.,

has adopted a similar attitude concerning the constitutional limit of rate regulation,[35] and the Maine Commission has taken even a firmer stand as a matter of permanent policy, supported by the Supreme Court of that state, which said: "If the rates established represent the maximum reasonable value of the service to the consumer, it cannot be said that they are confiscatory as to the Company, whatever may be the result upon its returns."[36]

Prior to the current depression, the only other period during which the validity of temporary rate changes was passed upon by the courts was during and immediately following the World War. All costs rose to high levels during that era and rate increases were liberally granted by commissions where the utilities could show that their services or financial structures were endangered by the rise in the price level.[37] The emergency rates of that period were based entirely upon the increased cost to the utility of rendering the service, without any valuation of the property devoted to the public service, and where the issue was presented to the courts, the increases were upheld.[38] The wartime experience, however, does not furnish a direct analogy to support temporary rate decreases during a depression against constitutional attack. When a consumer argues that utility rates are so far above the confiscatory level that they are unreasonable, he raises no constitutional issue. He must rely upon the common law or statutory duty of the utility to charge reasonable rates; and the criteria applicable to his case may be quite different from those invoked when a utility attacks a rate on the ground that property is taken without due process of law.

Where temporary rates scaling down utility charges have come before the courts in the past, they have been regarded with suspicion.[39] Although

(Wis. P. S. Comm.) P.U.R. 1933B, 441 (telephone rates lowered to value of service to induce former patrons to return).

35. City of Troy v. Alabama Utility Co., (Ala. P. S. Comm. 1931) P.U.R. 1932A, 435.

36. Hamilton v. Caribou Water, Light and Power Co., 121 Me. 422, 425-6, 117 Atl. 582, 584 (1922), quoted in Gay v. Damariscotta-Newcastle Water Co., 131 Me. 304, 162 Atl. 264 (1932); Brunswick and T. Water Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904). For a unique application of the value of the service concept see 1933 12 P. U. FORT. 294.

37. The numerous commission orders are collected in the Public Utility Reports for 1918 to 1921. Such increases were refused where the utility could not show probable injury. *In re* Tri-State Tel. and Tel. Co., (Minn. R. R. & Warehouse Comm.) P.U.R. 1919C, 5.

38. Northwestern Bell Tel. Co. v. Hilton, 274 Fed. 384 (D. Minn. 1921); Chicago Rys. Co. v. Chicago, 292 Ill. 190, 126 N. E. 585, P.U.R. 1921A, 77 (1920); Kansas City v. Public Service Comm. of Mo., 276 Mo. 539, 210 S.W. 381, P.U.R. 1919D, 422; O'Brien v. Public Utility Comm'rs, 92 N. J. Law 587, 105 Atl. 132, P.U.R. 1919D, 774; Okla. Gas and Electric Co. v. State Corp. Comm., 83 Okla. 281, 201 Pac. 505 (1921).

39. This attitude has prevailed despite the presumption in favor of administrative determination which requires one seeking to enjoin rates to show clearly their con-

some state courts have upheld rates considered compensatory no matter how computed,[40] those thought to be confiscatory, even though established for a brief interval, have been restrained.[41] The rationale of those restraining orders is clearly set forth in *Prendergast v. New York Telephone Co.*:[42] "They [temporary rates] were *final* legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory, the company would be deprived of a reasonable return upon its property during the period, *without remedy*, unless their enforcement should be enjoined." In that case the Supreme Court, enjoining the temporary reduction, continued the old rates until the completion of the new final schedule, and required the utility to give a bond for repayment of whatever overcharges during the temporary period a subsequent final determination of rates would reveal. Although the Court apparently considered bonding adequate to protect consumers of utility services, that procedure not only prevents the adjustment of rates so urgently needed in a depression, but does not even assure repayment to surcharged consumers.[43]

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fiscatory character. San Diego L. & T. Co. v. Jasper, 189 U. S. 439, 441, 446 (1903); Des Moines Gas Co. v. Des Moines, 238 U. S. 153 (1915); Aetna Life Ins. Co. v. Hyde, 275 U. S. 440 (1928).

40. Elliott v. Empire Nat. Gas Co., 123 Kan. 558, 256 Pac. 114, P. U. R. 1932D, 751; Upstate Tel. Corp. v. Maltbie, 154 Misc. 512, 278 N. Y. Supp. 283 (Sup. Ct. 1934); Am. Indian Oil Co. v. Collins & Co., 157 Okla. 49, 9 P. (2d) 438 (1932) P. U. R. 1932C, 267.

41. Southwestern Bell Tel. Co. v. Public Service Comm. of Mo., 262 U. S. 276 (1923); Prendergast v. N. Y. Telephone Co., 262 U. S. 43 (1922); Indiana Gen. Serv. Co. v. McCardle, 1 F. Supp. 113, (S. D. Ind. 1932); New York Edison Co. v. Maltbie, 244 App. Div. 436, 279 N. Y. Supp. 949, 8 P. U. R. (N. S.) 337 (3d Dep't 1935); Cleveland v. Public Utility Comm., 126 Ohio St. 91, 183 N. E. 924 (1933).

42. 262 U. S. 43 (1922), italics supplied. A temporary reduction was made under N. Y. PUBLIC SERVICE LAW § 97 pending final determination. It was said that: "If the Commission, however, had fixed an early date for the final hearing, this might have been taken into consideration by the court as an element affecting the exercise of its discretion in the matter of granting an interlocutory injunction." 262 U. S. at 50. See Block v. Hirsh, 256 U. S. 135, 157 (1921) ("A limit in time, to tide over a passing trouble, may justify a law that could not be upheld as a permanent change."); Chastleton Corp. v. Sinclair, 264 U. S. 543 (1924); Indianapolis Water Co. v. McCardle, P. U. R. 1933B, 222 (S. D. Ind. 1932). Time limits are set in Illinois and Virginia at nine months unless extended three more by the commission, but not in Wisconsin, Indiana, Ohio, or New York which require only that the final rate become effectual when found.

43. Return of excess rates by the utility to surcharged consumers is unsatisfactory in the case of gas, electric, and water services when the cost and inconvenience of the accounting is practically prohibitive, and impossible in the case of street railways. See International Ry. Co. v. Prendergast, 52 Fed. (2d) 293, (W. D. N. Y. 1930) (increased rate with bond denied to street railway); Beutel, *Due Process in Valuation of Utilities* (1929) 13 MINN. L. REV. 409, 433; (1934) 34 COL. L. REV. 379.

Since the bonding device, however inadequate it may be, has been judicially approved,[44] the legislatures of Illinois, Virginia, and New York have adopted its converse, the "recoupment clause". Under the procedure set up in those statutes temporary rates are determined speedily on an abbreviated investigation of the books and/or property of the utility, and provision is made in the final rates for reimbursement to the utility to the extent that final rates as fixed after a full valuation show that the temporary schedule was too low.[45] It is the purpose of the recoupment provision to avoid the Supreme Court's condemnation of finality and lack of redress in the *Prendergast* case, and to forestall allegations of irreparable injury.[46]

Pursuant to the newly-enacted New York statute, the New York Public Service Commission entered a temporary order reducing the rates of the Bronx Gas and Electric Company approximately 20% and of the Yonkers Light and Power Company 6%, to a point at which it was computed that the utilities would receive an excess of 6% upon book value.[47] Upon attack by the utilities of the order and the statute upon which it was based, the New York Court of Appeals upheld the procedure as constitutional.[48] The Court stated that a temporary rate schedule provided a reasonable means for flexible adjustment of rates to a changed price level and that the provision for recoupment out of the final rates remedied the defect of premature finality which was declared fatal in the *Prendergast* case. Since in the past courts have required the utilities to put up bonds to pay back customers overcharges which had been exacted pending a final rate determination, the New York Court considered it feasible and legal to turn the remedy about and provide that the consuming public should make good

44. Bonding has been used in conjunction with a continuance of the existing high rate pending final reduction, as in the *Prendergast* case, and with a temporary rate increase pending final determination of the higher rate. See Banton v. Belt Line Ry. Co., 268 U.S. 413 (1924). See also Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196, 204 (1924); Indiana Gen. Serv. Co. v. McCardle 1 F. Supp. 113, P.U.R. 1932D, 378 (S. D. Ind. 1932); (1933) 1 GEO. WASH. L. REV. 286, (1934) 34 COL. L. REV. 379.

45. See note 10, *supra*. The Oklahoma Commission pursued a similar policy in setting a temporary low rate with the promise to reimburse the utility if the rate was found too low. *In re* Oklahoma Nat. Gas Corp., P.U.R. 1931B, 470, 476; *In re* Anthony, P.U.R. 1930B, 481.

46. Swidler, *supra* note 9, at 204.

47. Bronx Gas and Electric Co. v. Maltbie, Yonkers Electric Light and Power Co. v. Maltbie, 271 N. Y. 304, 368-9, 3 N. E. (2d) 512, 513 (1936). If all the elements of value which the companies insisted upon were included, the return would be 4.89% for The Yonkers Co. and 4.84% for The Bronx Co., 272 N. Y. at 376, 3 N. E. (2d) at 516.

48. *Ibid.* (1936) 36 COL. L. REV. 1177. It should be noted that there has been no judicial disapproval of temporary rates based on statutes providing recoupment. Condemnation has been of final rates which leave the utility without redress and does not apply to statutory schedules which are provisional and reparative.

to the company the loss which it may have sustained in temporarily exacting too little.[49]

It is clear that the Supreme Court will not approve temporary rates thought to be prima facie confiscatory if they are defended solely on the ground that they are probational.[50] The guarantee of recoupment in the final rates based upon a full valuation, however, should render constitutional those rates which have been reduced for a temporary period in the public interest, even if some of those rates are ultimately found to have been confiscatory for the brief period in which they were effective. Permitting the provision for recoupment to save the constitutionality of temporary rates may be justified in either of two ways. In the first place, there appears to be no compelling economic or legal reason for holding that the compensation to which a utility is constitutionally entitled must be constant or must be adequate during each fiscal period. The relation of the utility to the public is a long continuing one; and both due process of law and economic policy appear to demand only that the return be a fair one on a fair value as an average, and would seem to permit deviations above or below that level where assurance is made that the balance will be restored, not necessarily within a year or other definite accounting period, but within a longer or shorter period as the circumstances warrant.[51] A second approach, urged in support of the New York statute,[52] is that the Constitution permits a present confiscation with assured future compensation.[53] If compensation were guaranteed out of the public treasury, this view would undoubtedly be upheld.[54] And where payment is provided for in future rates, the same result should obtain; for the demand for utility services is relatively inelastic and guarantees reimbursement quite as effectively as would payment out of the public treasury.

49. 271 N. Y. at 373-4, 3 N. E. (2d) at 515.

50. Knoxville v. Knoxville Water Co., 212 U. S. 1 (1909); Northern Pacific R. R. Co. v. Dept. Pub. Works, 268 U. S. 37 (1925); Smith, *supra* note 17, at 628.

51. " . . . the fair rate of return to which public utilities are entitled is one that is adequate on the average . . . they have no legitimate ground for complaint if on the average they are permitted to earn an adequate rate of return." JONES AND BIGHAM, *op. cit. supra* note 1, at 262. *Cf.* Municipal Gas Co. v. Public Service Comm., 225 N. Y. 89, 121 N. E. 772 (1918).

52. Argument of Counsel in Bronx Gas and Electric Co. v. Maltbie. Although the argument was not commented upon in the Court of Appeals decision on the case, it was approved by the dissenting opinion in the lower court, 283 N. Y. Supp. 839, 853 (1935).

53. The analogy between taking by eminent domain and confiscatory rates is made in West v. C. & P. Tel. Co., 295 U. S. 662, 671 (1935). See also People v. Adirondack Ry. Co., 160 N. Y. 225, 54 N. E. 685 (1899), *aff'd*, 176 U. S. 335 (1900); Sweet v. Rechel, 159 U. S. 380, 400, 404, 407 (1895); Hays v. Port of Seattle, 251 U. S. 233, 238 (1919).

54. Cases cited note 53, *supra*. But see Sage v. City of Brooklyn, 89 N. Y. 189 (1882) (a guarantee from taxes of a limited assessment district held inadequate).

A minor objection urged by the utility against the recoupment clause is that the reparative final rate might be charged to consumers who have just moved into the territory and therefore did not have the benefit of the low temporary rate. The Court, while not convinced that the utility was in a position to make that argument on behalf of the new customers, answered the contention. The Constitution, it declared, sets forth only fundamental principles, and considerations of administrative convenience support a measure conforming to those broad constitutional outlines, even though deviating from them in minor details.[55]

But the depression is apparently passing and with it the urgent need for emergency rate schedules. The statutes of Illinois, Virginia, and particularly New York, however, furnish models to be followed by other states in providing a constitutional machinery for ordering temporary rates whenever they are again needed.[56] But the depression experiments in temporary rate regulation have failed vigorously to exploit the possibility of basing utility rates more directly on "value of service" criteria. Despite difficulties of measuring the "value" of utility services in the absence of market competition for them, such standards have long been used in the regulation of carrier rates and have considerable judicial support when applied to utility charges.[57] The recent statutory attempts to reduce utility rates quickly during the depression have been confined to making the valuation process more flexible, within the formula of a "fair return on a fair value". Within the limits of this objective, these statutes promise to make substantial relief available during the next depression, if the Supreme Court approves their plan. Although most of the depression period was spent in devising these statutes and testing them in the courts, they now offer an improved technique for forcing rates to move with other prices.

The experience of the depression illustrates again the thesis that the fundamental barrier to effective rate regulation is the emphasis upon reproduction cost new less depreciation in the determination of value. Even in normal times the valuation of utility property for rate-making purposes is an extraordinarily cumbersome procedure, a deficiency which is dramatically illustrated when rates must be reduced quickly. If the basic "fair return on a fair value" formula is to be retained as the central theme of utility regulation, the need for and the usefulness of book value or prudent invest-

55. Bronx Gas & Elec. Co. v. Maltbie, 271 N. Y. 364, 374-5, 3 N. E. (2d) 515, 516 (1936).

56. Lilienthal, *supra* note 1, at 754-755, urges that a "depression reserve" be accumulated from rates in excess of a legal fair return during good times and set aside to assure the utility a fair return although a rate reduction would be made during depression. A like view is expressed in JONES AND BIGHAM, *op. cit. supra* note 1, at 261.

57. See note 29, *supra*.

ment as a valuation base, so strongly urged by Mr. Justice Brandeis and Mr. Justice Holmes in dissenting from the decision of *Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*,[58] are more apparent now than at the time of their argument.[59] The practicality of that base for obtaining quick and orderly rate adjustment has been demonstrated by its use under the New York temporary rate statute. And the major objection to it at the time of *Smyth v. Ames*[60]—the absence of careful records—is today less valid than when Mr. Justice Brandeis in the *Southwestern Bell Telephone Co.* dissent pointed to the then existing careful accounting systems which commissions of most states were authorized to impose upon utilities. Uniform accounting systems, such as those recently adopted by the Federal Communications Commission and Federal Power Commission for their licensees and interstate companies and by the New York Public Service Commission for companies in its jurisdiction, should go far further to weaken that objection.[61] Whether historical cost will ever be allowed completely to replace reproduction cost new is yet to be determined. Certainly the usage of regulating bodies places less and less emphasis on reproduction cost, and the current uniform accounting movement, now strengthened by the support of the Supreme Court,[62] may finally eliminate reproduction cost as a useful standard for rate-making.

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58. 262 U. S. 276 (1923), at 289 *et seq.*

59. In this classic dissent Mr. Justice Brandeis concisely states the logic of the prudent investment base. Affirming its validity today, whatever its early utility, the Justice points out: "Those were the days (the time of *Smyth v. Ames*) before state legislation prohibited the issue of public utility securities without authorization from state officials; before accounting was prescribed and supervised; when outstanding bonds and stocks were hardly an indication of the amount of capital embarked in the enterprise; when depreciation accounts were unknown; and when value, or property accounts, furnished no trustworthy evidence either of cost or of real value." But an extended discussion of faults of the reproduction cost base and merits of the prudent investment base is beyond the scope of this comment. See MOSHER AND CRAWFORD, PUBLIC UTILITY REGULATION (1933) ch. XV; ROBINSON, CASES ON PUBLIC UTILITIES (2d ed. 1935) p. 397–9; BAUER AND GOLD, PUBLIC UTILITY VALUATION (1935) pp. XII, 477. The objection made by Lilienthal, *supra* note 1, at 754–755, that the frozen or rigid rate base obtained from use of prudent investment would prevent rate adjustment in high or low economic periods is valid only so long as the flexibility inherent in rate of return continues to be disregarded, and fails if proper attention is given to this neglected factor.

60. 169 U. S. 466 (1897).

61. See N. Y. Times, May 20, 1936, p. 33, col. 1; *id.* May 25, 1936, p. 6, col. 3; *id.* Oct. 25, 1936, § III, p. 1, col. 5; *id.* Oct. 31, 1936, p. 27, col. 4.

62. American Tel. & Tel. Co. v. United States, (Dec. 7, 1936) 4 U. S. L. WEEK 351.